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No. 82-1873

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ALFONZO L. DOWELL AND VIVIAN T. DOWELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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June 1983

QUESTION PRESENTED

The question presented is whether this petition for a writ of certiorari should be denied because the petition is out of time and the Court, therefore, lacks jurisdiction to grant the writ.

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IN THE

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October Term, 1982

No. 82-1873

COMMISSIONER OF INTERNAL REVENUE

Petitioner,

v.

ALFONZO L. DOWELL AND VIVIAN T. DOWELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The following additional facts are added to Petitioner's statement. The judgment of the Court of Appeals for the Tenth Circuit in respect of which the Petitioner seeks *certiorari,* was entered by the clerk of the court of appeals on February 11, 1980. The court "remanded" the case to the tax court. On March 20, 1980, the clerk of the court of appeals sent to the clerk of the tax court a certified copy of the judgment and

opinion which constituted the mandate of the court. On May 5, 1980, the Justice Department advised the clerk of the court of appeals "that the Solicitor General has decided not to file a petition for *certiorari.*" (Appendix A.) On May 22, 1980, the Justice Department instructed the General Accounting Office to pay the taxpayers' costs and stated that judgment is final. (Appendix B.)

On November 25, 1980, the tax court rendered a decision in accordance with the mandate of the court of appeals, that there was no deficiency for the years in question. (Appendix C.)

Subsequent to judgment of the court of appeals in 1980, which precluded the assessment of tax deficiencies against the Respondents as time-barred, the Respondents also sought a determination from the tax court that, in accordance with the mandate, they had made refundable overpayments of tax for three of the four tax years originally involved. The tax court held it was without jurisdiction to make such a determination. The tax court thereupon granted *both* parties' motions for a decision that there were no deficiencies in Respondents' taxes for all four years and held that the balance of the motions filed by the parties regarding overpayments was "moot."

On Respondents' appeal of the overpayment issue with respect to three of the tax years (which appeal was filed more than 30 days after entry of the tax court decision), the court of appeals in 1983 affirmed that the tax court was without jurisdiction to determine overpayments for such years.[1]

The Government's motion for an enlargement of time in which to petition for a writ of *certiorari* was filed 1,149 days after the judgment which it seeks to have reviewed.

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[1] On December 27, 1981, before the decision was rendered on Respondents' appeal, Vivian T. Dowell died.

REASONS FOR DENYING THE WRIT

The petition for *certiorari* is not timely and this Court is without jurisdiction to hear the case. More than 90 days have elapsed since February 11, 1980, the date of the entry of judgment of the court of appeals by the clerk of that court, 28 U.S.C. § 2101(c), Rule 20.2, and the subsequent tax court decision has become final.

I. THE TAX COURT DECISION IS FINAL AND NONREVIEWABLE UNDER 26 U.S.C. § 7481(a)(3)

The 1983 judgment of the court of appeals affords no jurisdictional basis upon which to seek review by this Court. The finality of the tax court's 1980 decision in accordance with the 1980 mandate of the court of appeals is expressly prescribed by statute. Under the specific language of 26 U.S.C. § 7481(a)(3)(B)(i) (Appendix D), the second tax court decision rendered in accordance with the mandate became final and nonreviewable when no appeal was filed within 30 days after it was entered.

The issue of certain overpayments raised by the taxpayer in the second tax court proceeding was a request for clarification and application of the 1980 judgment of the court of appeals with respect to such alleged overpayments of tax for three years. The tax court held it did not have jurisdiction over the overpayment issue and that its jurisdiction was limited to the issue decided in 1980 by the court of appeals. Therefore, the tax court decision in accordance with the court of appeals' mandate became final when no appeal to have the decision corrected was filed within 30 days thereof. *See Crews* v. *Commissioner,* 120 F.2d 749 (10th Cir. 1941); *Seiberling Rubber Co.* v. *United States,* 297 F.2d 842, 846 (Ct. Cl. 1962), *cert. dismissed,* 371 U.S. 801 (1962); *cf. R. Simpson & Co.* v.

Commissioner, 321 U.S. 225 (1944); *Helvering* v. *Northern Coal Co.,* 293 U.S. 191 (1934); *Lasky* v. *Commissioner,* 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam,* 352 U.S. 1027 (1957).[2]

The second tax court proceeding was not a rehearing within the meaning of 26 U.S.C. § 7481(a)(4), which provides, as an exception to the 30-day rule of finality, that upon a *rehearing ordered* by the Supreme Court or the court of appeals, the second tax court decision becomes final if no appeal is filed within 90 days. 26 U.S.C. §§ 7481(a)(1), (4), 7483. No rehearing was ordered by the court of appeals here.[3] Indeed, there was no occasion for a rehearing in the tax court because both parties moved the tax court to enter a judgment of no deficiency pursuant to the 1980 judgment of the court of appeals, Pet. App. C., 12a, 20a; Pet. App. D., 23a. Moreover, the tax court found it was *without jurisdiction* to hear anything further. In the absence of a rehearing ordered by the court of appeals, that court could not assume jurisdiction of the second appeal since the appeal was filed more than 30 days after the decision of the tax court was entered. *See Seiberling Rubber Co.* v. *United States,* 297 F.2d at 846; *Crews* v. *Commissioner,* 120 F.2d at 751.

II. THE PETITION IS UNTIMELY UNDER THE DOCTRINE OF *FEDERAL TRADE COMMISSION* V. *MINNEAPOLIS HONEYWELL REGULATOR CO.*

Even assuming *arguendo* that the court of appeals had jurisdiction of the appeal from the second tax court decision, the Petitioner is in error in relying on the entry of the second judgment of the court of appeals on January 19, 1983, as a basis for seeking a writ of *certiorari* with respect to the issue resolved by the court of appeals in 1980. This Court has plainly held that a second judgment provides a new basis from which to compute the 90 days within which to petition this Court *only* if

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[2] The decisions in *Crews* and *Seiberling Rubber Co.* were rendered under section 1140(c)(2) of the Internal Revenue Code of 1939 which is identical in substance to section 7481(a)(3)(B) of the Internal Revenue Code of 1954.

[3] The mandate states that the case was remanded "for further proceedings." This is not a mandate for a rehearing. *See Crews* v. *Commissioner,* 120 F.2d at 750.

the second judgment changes matters of substance in the first judgment or resolves a genuine ambiguity in the previous judgment. *Federal Trade Commission* v. *Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952). *See also King* v. *PreTerm Inc.*, 448 U.S. 901 (1980).

> "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." 344 U.S. at 211-212 (footnotes omitted).

Here, the first judgment determined the rights of the parties with respect to the issue on which the Petitioner seeks *certiorari*. The tax court implemented that judgment by granting the motions of both parties that there were no deficiencies against the taxpayers for the applicable years. The second judgment of the court of appeals did not "disturb[ ] or revise[ ] legal rights and obligations which . . . had been plainly and properly settled with finality" by the first judgment. It merely affirmed that the tax court did not have jurisdiction to do anything more than enter a decision in accordance with the first judgment.

III. THE PETITION OFFERS NO REASON WHY *CERTIORARI* SHOULD BE GRANTED

Petitioner offers no discernible reason for granting the writ. It merely states that this Court should resolve the conflict between the courts of appeals on the statute of limitations issue—a conflict which the Court has already determined to hear in other pending cases.[4] But the substantive issue has long

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[4] *Badaracco* v. *Commissioner* and *Deleet Merchandising Corp.* v. *United States*, 693 F.2d 298 (3d Cir. 1982), *cert. granted*, Nos. 82-1453 and 82-1509 (May 16, 1983).

been resolved with finality for the taxpayer *in this case* by the judgment of the court of appeals on February 11, 1980. The Petitioner cannot disinter a judgment rendered more than three years ago, which it accepted as final,[5] and which, when implemented by the tax court, became final and nonreviewable under the express provisions of 26 U.S.C. § 7481(a)(3).

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[5] The cases cited by Petitioner (p. 5 n.3) are irrelevant. Each involved the question whether the Court can review an interlocutory judgment of the court below if the Petitioner contests the final judgment of that court in a timely fashion. Here, Petitioner never contested the first judgment of the court of appeals. The Petitioner was successful on the second judgment; neither party seeks review of the second judgment. Only now, Petitioner seeks review of the first judgment which has no issue in common with the second judgment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: June 1983

APPENDIX A

U.S. Department of Justice

Tax Division

Washington, D.C. 20530

MCF:GEA:PIBrennan:esp
5-13874

May 5, 1980

HOWARD K. PHILLIPS, Esquire
Clerk, U. S. Court of Appeals
for the Tenth Circuit
Room 469, U. S. Courthouse Bldg.
19th & Stout Streets
Denver, Colorado 80202

Re: Dowell v. Commissioner
(C.A. 10 — No. 78-1341)

Dear Mr. Phillips:

This is to advise that the Solicitor General has decided not to file a petition for certiorari in the above-entitled case.

It would be appreciated if you would forward two certified copies of Appellee's bill of costs as taxed and one certified copy of the judgment of the Court of Appeals for the Fifth Circuit.

Your cooperation is greatly appreciated.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: GILBERT E. ANDREWS
Chief, Appellate Section

cc: Julius M. Greisman, Esquire
Nancy S. Abramowitz, Esquire
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

APPENDIX B

U.S. Department of Just[sic]

Tax Division

Washington, D.C. 20530

MCF:GEA:PIBrennan:esp
5-13874

May 22, 1960[sic]

Claims Division
General Accounting Office
Washington, D.C. 20548

Re: Dowell v. Commissioner
(C.A. 10—No. 78-1341)

Dear Sir:

We are transmitting herewith two certified copies of the Appellee's Bill of Costs and one certified copy of the Judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case.

This Judgment is final and you are authorized to cause the issuance of a check and forward it directly to Julius M. Greisman, Esquire, Nancy S. Abramowitz, Esquire, Arnold & Porter, 1229 Nineteenth Street, N.W., Washington, D.C. 20036.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
Tax Division

By: _____
GILBERT E. ANDREWS
Chief, Appellate Section

Enclosure

cc: Julius M. Greisman, Esquire
Nancy S. Abramowitz, Esquire
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1229 Nineteenth Street, N.W.
Washington, D. C. 20036

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ALFONZO L. DOWELL and
VIVIAN T. DOWELL

Petitioners

v.

Docket No. 2150-75

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Tenth Circuit, filed March 24, 1980, the decision of this Court was reversed and remanded. NOW, THEREFORE, it is

ORDERED and DECIDED that petitioners' motion for entry of decision, filed May 16, 1980, and respondent's motion for entry of decision, filed June 19, 1980, are granted insofar as there are no deficiencies for the taxable years 1963, 1964, 1965, and 1966. In all other respects, as pertains to any overpayments, for the reasons stated in our Memorandum Opinion, filed November 20, 1980, petitioners' and respondent's motions are moot.

Norman O. Tietjens
Judge

ENTERED: NOVEMBER 25, 1980
SERVED: NOVEMBER 25, 1980

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

§ 7481. Date when Tax Court decision becomes final

(a) Reviewable decisions.

Except as provided in subsection (b), the decision of the Tax Court shall become final—

(1) Timely notice of appeal not filed

Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or

(2) Decision affirmed or appeal dismissed

(A) Petition for certiorari not filed on time

Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals and no petition for certiorari has been duly filed; or

(B) Petition for certiorari denied

Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals; or

(C) After mandate of Supreme Court

Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the appeal dismissed.

(3) Decision modified or reversed

(A) Upon mandate of Supreme Court

If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the

mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(B) Upon mandate of the Court of Appeals

If the decision of the Tax Court is modified or reversed by the United States Court of Appeals, and if—

(i) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(ii) the petition for certiorari has been denied, or

(iii) the decision of the United States Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(4) Rehearing

If the Supreme Court orders a rehearing; or if the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, and if—

(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(B) the petition for certiorari has been denied, or

(C) the decision of the United States Court of Appeals has been affirmed by the Supreme Court,

then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered.